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No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1986

TRANS INTERNATIONAL AIRLINES,
Petitioner,

vs.

VIRGINIA NEWSOME, et al.,
Respondents.

TRANS INTERNATIONAL AIRLINES,
Petitioner,

vs.

CRAIG A. KUECHEMEISTER, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF ALABAMA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does Article 19 of the Warsaw Convention provide a cause of action to any passenger for any delay of an international charter flight — no matter how short or long the delay might be?

2. Do Civil Aeronautics Board regulations, promulgated pursuant to the Federal Aviation Act of 1958 and incorporated into the terms of a contract of carriage, supplement and define the term "delay" as used in Article 19 of the Warsaw Convention?

3. Does Article 19 of the Warsaw Convention permit carriers to condition liability for delay by placing express provisions into the contract of carriage?

LIST OF PARTIES

The parties to the proceedings below were the petitioner Trans International Airlines, Mabel Forrester (individually and doing business as Sky III Enterprises, "Ambassadors Abroad"), the class of plaintiffs represented by Virginia A. Newsome in the class action captioned *Virgina A. Newsome, et al. v. Trans International Airlines, et al.* and the class of plaintiffs represented by Craig A. Kuechenmeister in the class action captioned *Craig A. Kuechenmeister, et al. v. Trans International Airlines, et al.* Both of the class action suits were certified and consolidated for trial by the Circuit Court of Alabama.

Mabel Forrester's directed verdict was affirmed by the Alabama Supreme Court and since that issue is not addressed in this petition, Mabel Forrester is not named as a party herein.

The petitioner before this Court is Trans International Airlines,* and the respondents are that class of plaintiffs represented by Virginia A. Newsome and that class of plaintiffs represented by Craig A. Kuechenmeister in the consolidated class action matter.

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* For compliance with Rule 28.1 see Appendix p. A-26.

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No. _____

IN THE

UNITED STATES SUPREME COURT

October Term, 1986

TRANS INTERNATIONAL AIRLINES,
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vs.

VIRGINIA NEWSOME, et al.,
Respondents.

TRANS INTERNATIONAL AIRLINES,
Petitioner,

vs.

CRAIG A. KUECHEMEISTER, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

Petitioner Trans International Airlines requests that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Alabama entered in this action on March 28, 1986 which, in part, reversed and

remanded for retrial a final judgment of the Circuit Court of Jefferson County, Alabama.

OPINIONS BELOW

The opinion of the Alabama Supreme Court, not yet released for official publication, is reprinted in the appendix hereto at page la, *infra*. The final judgments of the Circuit Court of Jefferson County, Alabama, which are unreported, are reprinted at __ a and __ a, *infra*.

JURISDICTION

The judgment of the Alabama Supreme Court was entered on March 28, 1986. A timely application for rehearing was over-ruled on June 27, 1986. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

TREATY AND FEDERAL STATUTES AND REGULATIONS INVOLVED

This case concerns the construction and purpose of the Warsaw Convention, *concluded* October 12, 1929, 49 Stat. 3000, T.S. 876, 137 L.N.T.S. 11 *reprinted at* 49 U.S.C. §1502 note, in particular, Article 19 thereof. This case further concerns the Federal Aviation Act, Pub. L. 85-726, 72 Stat. 737 (1958), codified as amended at 49 U.S.C. §1301 *et. seq.* and Civil Aeronautics Board regulations promulgated pursuant to the authority granted by the Federal Aviation Act.

STATEMENT OF THE CASE

This class action arises as a result of a delay in the departure of a tour group on a charter flight from Birmingham, Alabama to Europe. Respondents are representatives of the class members of the tour group, and petitioner TRANS INTERNATIONAL AIRLINES ("TIA") is the carrier that provided transportation for the tour group to Europe.

Mabel Forrester, doing business as Sky III Enterprises and Ambassadors Abroad, a named defendant in the action, organized the European charter tour for respondents. In this regard, Forrester contracted with TIA to provide a roundtrip charter flight for respondents aboard a TIA aircraft from Birmingham, Alabama to Milan, Italy and on to Athens, Greece.

On March 11, 1979, as a result of mechanical difficulties, the scheduled departure of the TIA chartered flight for the tour group was delayed approximately 32 hours. TIA provided hotel accommodations, meals and ground transportation during the delay. Due to this delay, plaintiffs instituted a class action for breach of contract against TIA and Mabel Forrester.[1] This action proceeded to trial and after the close of plaintiffs' case, both TIA and Mabel Forrester moved for directed verdicts which were granted by the court. Thereafter, plaintiffs appealed the lower court's ruling to the Alabama Supreme Court, and on March 28, 1986, the Alabama Supreme Court, in part,

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[1] An initial class action was filed on September 13, 1979 by Virginia A. Newsome and others against TIA and Mabel Forrester. On September 12, 1979, a second class action was filed with the Kuechenmeisters as named plaintiffs against TIA and Forrester. Both actions were consolidated and certified as class actions by court order.

reversed the trial court's ruling and remanded the case for retrial. TIA's application for rehearing was overruled on June 27, 1986.

The trial court granted TIA's motion for directed verdict based upon the finding that there was no breach of contract by TIA because of the delay provisions incorporated into the charter contract. This delay provision, promulgated pursuant to a Civil Aeronautics Board ("CAB")[2] Regulation, provided that TIA was only obligated to provide substitute air travel in the case of delays in excess of 48 hours. Therefore, since the delay was 32 hours and since the contract terms and CAB regulation permitted delays up to 48 hours, the court determined that the contract had not been breached and no cause of action could be maintained.

The Alabama Supreme Court reversed this decision on the ground that Article 19 of the Warsaw Convention[3] provides a remedy for any delay of an international charter flight. The Alabama Supreme Court found that the CAB regulation and charter tariff permitting delays up to 48 hours was not intended to define and supplement the term "delay" as used in Article 19 of the Convention, and that Article 19 did not permit a carrier to condition liability for

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[2] The Airline Deregulation Act of 1978, Pub. L. No. 95-504, § 40, 92 Stat. 1075, 1744 (1978), terminated the Civil Aeronautics Board as well as some provisions of the Federal Aviation Act of 1958, 49 U.S.C. 1301 *et seq.* (1976). The authority of the CAB with respect to foreign air transportation was transfered to the Department of Transportation. 49 U.S.C. § 1551(b)(B) (1981).

[3] The Warsaw Convention, formerly titled "The Convention for the Unification of Certain Rules Relating to International Transportation by Air", was adhered to by the United States in June 1934. The original Convention was published in French and an English translation is published at 49 Stat. 3014 (1934) and 49 U.S.C. § 1502 note (1976).

delay by contract.[4] In short, the Alabama Supreme Court held that any international passenger has a cause of action for breach of contract under Article 19 as long as a flight is delayed for any amount of time no matter how short that amount of time may be.[5]

REASONS FOR GRANTING THE WRIT

The Alabama Supreme Court decision interpretes the Warsaw Convevtion to provide an international air passenger with an action for delay against the carrier for any deviation in that carrier's charter flight. This interpretation is contrary to the intent of the Convention. Given the nature of air travel this would run havoc among all international air carriers. Furthermore, the Alabama opinion forbids the cognizant federal agency (or the carrier by contract) from placing reasonable restrictions on this action for delay.

This decision reflects inaccurate law. In fact, the Warsaw Convention both permits a signatory state to reasonably define the term "delay" and allows carriers to condition

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[4] The ticket jacket, a part of the contract of carriage between TIA and respondents, stated the flight times for the entire tour, including the departure from Birmhingham, Alabama. However, on the front of the jacket, just below the flight times, was specified, "ALL TIMES SHOWN ARE LOCAL TIMES (issued for informational purposes only)".

[5] The Alabama Supreme Court also found that the Warsaw Convention was plaintiff's exclusive remedy and that all state common law actions were inapplicable. However, on retrial, in order to employ the liability limitations of the Convention, TIA must show that the airline tickets were timely delivered to respondents. Finally, the Supreme Court upheld Mabel Forrester's directed verdict because of a hold harmless clause in her contract with respondents.

liability by contract. The Alabama Court opinion is in conflict with at least one federal court case, and in effect, puts carriers in the impossible position of either being exactly on time or being faced with lawsuits by all the passengers. Given this decision's important implications to international air travel, it is appropriate and advisable that the Supreme Court grant certiorari to resolve this issue under the Warsaw Convention.

I

THE ALABAMA SUPREME COURT INCORRECTLY FOUND THAT THE CAB TARIFF, INCORPORATED INTO THE CONTRACT OF CARRIAGE, WAS NOT INTENDED TO DEFINE AND SUPPLEMENT THE TERM "DELAY" AS USED IN ARTICLE 19

The contract of carriage between TIA and respondents, as evidenced by the passenger ticket, incorporated all applicable tariffs that TIA filed with the CAB.

Once a tariff is filed with the CAB it becomes part of the contract between the passenger and carrier. *Lichten v. Eastern Airlines, Inc.*, 189 F.2d 938 (2nd Cir. 1951); *Blair v. Delta Airlines, Inc.*, 344 F.Supp. 360 (S.D. Fla. 1972) *aff'd*, 477 F.2d 564 (5th Cir. 1973).

In this regard, TIA had in effect at the time of respondents' flight a charter tariff which stated:

> *Departure flight delays*: In the case of flight delays of more than forty-eight (48) hours beyond the departure time stated in the charter contract, TIA, upon request and at the charterer's option,

will provide alternate air transportation at no additional cost to the charterer.[6]

This tariff had been established by TIA in order to meet the requirements of a CAB regulation set forth at 14 CFR § 208.32(a) (1985).[7]

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[6] Rule No. 20(b) of TIA's charter tariff.

[7] 14 C.F.R. §208.32(a) states:

> Flight delays and substitute air transportation (foreign). Charter air carrier shall comply with the following requirements for passenger service in foreign air transportation. These requirements shall be without prejudice, and in addition, to any other rights or remedies of passengers under applicable law;
>
> (a) *Substitute Air Transportation.*
>
> (1) On all chartered flights, unless the air carrier causes an aircraft to finally emplane each passenger and commence the takeoff procedures at the airport of departure before the 48th hour following the time scheduled for the departure of such flight, it shall provide substitute transportation in accordance with the provisions of this paragraph.
>
> (2) As soon as the air carrier discovers or should have discovered by the exercise of reasonable prudence and forethought, that the departure of any such charter flight will be delayed more than 48 hours, such air carrier shall arrange for and pay the costs of substitute air transportation for the charter group on another charter flight, operated by any other carrier or foriegn air carrier.
>
> (3) When neither the charter transportation contracted for nor substitute transportation has been performed before the expiration of 48 hours following the scheduled departure time of any such charter flight, the charter, or his duly authorized agent, may arrange for substitute air transportation of the member of the charter group, at economy or tourist class fares, on individually ticketed flights and the chartered air carrier shall pay the cost of such air transportation to the substitute air carrier or foreign air carrier.

CAB Regulations were enacted pursuant to the authority of the Federal Aviation Act of 1958, 48 U.S.C. § 1301, *et seq.* (1958), and such regulations promulgated pursuant to legislative direction have the force and effect of federal law. *Slick Airways, Inc. v. United States*, 292 F.2d 515 (Ct. Cl. 1961). Tariffs filed with the CAB are conclusive and exclusive of the rights and liabilities of an airline and its passenger. *Tishman and Lipp, Inc. v. Delta Air Lines*, 413 F.2d 1401 (2nd Cir. 1969).

Accordingly, the charter tariff provision allowing delays up to 48 hours was part of the contract between TIA and respondents, and because it was established by a regulatory agency pursuant to statute is had the force and effect of federal law.

The fact that this tariff was incorporated into the terms of the charter contract as required by federal law was accepted by the Alabama Supreme Court. The State Supreme Court, however, found that respondents had a remedy under Article 19 of the Warsaw Convention and that although the Convention does not define the term "delay", the charter tariff delay provision was not intended to provide an interpretation of that term as used for this charter flight.

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(4) In determining the period of time during which the departure of a charter flight has been delayed within the purveiw of this paragraph, periods of delay caused by the probation of flights to or from the airport of departure because of weather or other operational conditions affecting such airport shall be excluded if, and while, the air carrier has available an airworthy aircraft which is capable of transporting the charter group in a condition of operational readiness.

The Warsaw Convention was drafted in 1929 when international air travel was at its inception. Concern developed that no air carrier could economically survive a large aircraft disaster. Representatives of several sovereign states agreed to meet and create a uniform body of law governing the rights and liabilities of passengers and air carriers in international transportation. *Dunn v. Trans World Airlines, Inc.*, 589 F.2d 408, 410 (9th Cir. 1978); 1 L. Kreindler, *Aviation Accident Law*, Section 11.01(2). The purpose of the Warsaw Convention was to both provide uniformity in respect to documentation and procedural matters and to impose limitation on liability for the air carriers. See *In Re Aircrash in Bali, Indonsesia on April 22, 1974*, 684 F.2d 1301, 1307 (9th Cir. 1982). Accordingly, the Warsaw Convention must be read with a view towards accomplishing those two fold purposes.

In the instant action, the Alabama Supreme Court determined that the Warsaw Convention was applicable because the flight in question from Birmingham to Italy and Greece was clearly "international" as that term is defined by Article 1, § 2 of the Convention.

Article 19 of the Convention is pertinent to any action for breach of contract caused by delay and states:

> The carrier shall be liable for damage occasioned by delay in the transportation by air of passengers, baggage, or goods.

The carrier's liability is subject to the defense set forth in Article 20 which states:

> (1) The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for them to take such measures.

Nowhere in the Convention is the term "delay" defined or is liability under Article 19 expounded upon. This United States treaty provision has not been explained in any U.S. Supreme Court opinion. It is thus necessary to examine other sources to determine the meaning of these provisions of the Convention. *In Re Aircrash in Bali, Indonesia on April 22, 1974*, 684 F.2d 1301 (9th Cir. 1982). In one of the two United States Supreme Court opinions concerning the Convention, *Trans World Airlines v. Franklin Mint Corp.*, 466 U.S. 243, 80 L.Ed.2d 273, 104 S.Ct. 1776 (1984), the Court permitted the CAB to supplement the Convention by using the last official price of gold as the Convention's limits. The Court concluded that the CAB's decision was consistent with domestic law and with the Convention itself, construed in light of its purposes, the understanding of the signatories, and its international implementation since 1929. Thus, it has been established that the CAB can reasonably supplement and provide definitions for terms in the Convention that would otherwise be ambiguous.

While no United States case law interprets the term "delay" as used in Article 19, several foreign countries have defined that term so that a cause of action under Article 19 can be maintained *only* in instances where the delay is for an *unreasonable* period of time. *See* Prof. dr. I.H. Ph. Diederiks-Verschoor, *An Introduction to Air Law* (1983), pp. 61-63; and Jean-Louis Magdelenat, *Air Cargo Regulation and Claims* (English Language Edition 1983) pp. 84-88. These countries obviously believe that the Convention permits them recourse to domestic law in regards to Article 19.

Although 14 CFR § 208.32(a) does not expressly state that it is intended to supplement Article 19, it is clear that charter air carriers and the CAB considered it to be the

remedy for delay of international charter flights. The only provision in the contract between TIA and respondents that in any way refers to liability for delay is the charter tariff which was promulgated pursuant to Section 208.32(a). Section 208.32(a), itself, is the only CAB regulation that establishes any rights for delay for passengers of international charter flights. Thus, the Warsaw Convention permits domestic law to reasonably supplement and define "delay" as used in Article 19, and the CAB reasonably did this with the enactment of Section 208.32(a).

The Alabama Supreme Court found language in Section 208.32(a) to directly refute that it was intended to define "delay" as used in Article 19. The second sentence of Section 208.32(a) states:

> These requirements shall be without prejudice, and in addition, to any other rights or remedies of passengers under applicable law.

Thus, the court found the CAB regulation was not respondents' sole remedy for delay. However, this misses the point. Section 208.32(a) does not supersede or exclude a remedy otherwise available, but merely defines a term. Also, defining "delay" to only mean instances where the time period exceeds 48 hours for charter flights does not violate the Convention's prohibitions against a carrier limiting its liability.[8] Again, Section 208.32(a) does not limit a carrier's liability but simply defines the term "delay" as

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[8] Article 23 of the Warsaw Convention states:

> Any provision tending to relieve the carrier of liability or to fix the lower limit in that which is laid down in this Convention shall be null and void, but the nullity of any such provision shall not involve the nullity of the whole contract, which shall remain subject to the provision of this Convention.

used in Article 19. *See Butler's Shoe Corp. v. Pan American World Airways, Inc.*, 514 F.2d 1283 (5th Cir. 1975) where the court ruled that a Pan Am tariff requiring that written notice of loss of goods must be received within 120 days did not limit a carrier's liability under Article 23.

Although the Alabama Supreme Court ruled that Section 208.32(a) does not define "delay" under Article 19, it did not provide an alternate definition for that term. The Alabama Supreme Court decision, if left standing, would support the proposition that a passenger has a cause of action for any delay of any international flight. Given the nature of air travel, few flights are able to meet to the exact minute the scheduled departure or arrival times. Thus, according to the Alabama Supreme Court opinion, a passenger could sue a carrier for a 5 minute delay in his arrival time subject only to affirmative defenses and damage limitations. This is obviously contrary to the intent of the Warsaw Convention and would run havoc among carriers in today's over-crowded airports.

The Alabama Supreme Court erred when it ruled that the term "delay" as used in Article 19 was not reasonably supplemented and defined by 14 CFR § 208.32(a) to provide actions for delay only in those instances where the delay was in excess of 48 hours.

II

THE ALABAMA SUPREME COURT INCORRECTLY RULED THAT ARTICLE 19 WAS NOT INTENDED TO PERMIT CARRIERS TO CONDITION THEIR LIABILITY FOR DELAY BY PLACING EXPRESS LIMITS IN THE CONTRACT OF CARRIAGE

While not discussed in the Alabama Supreme Court opinion, TIA argued that the Warsaw Convention, Article 19 permits carriers to condition their liability for delay by placing such conditions in the contract. In this case, TIA had expressly conditioned its liability for delay by providing in the ticket jacket, a portion of the contract, that the departure time listed was for informational purposes only[9] and by stating that it would supply substitute transportation for delays in excess of 48 hours. Thus, if a carrier is permitted to condition its liability for delay under the Convention, the Alabama Supreme Court decision should be overruled because TIA pursuant to contract expressly did condition liability for delay as permitted by the CAB.

In *Jahanger v. Purolator Sky Carrier*, 615 F.Supp. 29 (E.D. Penn. 1985), plaintiff alleged that he was damaged by a one day delay in the delivery of an international package. Plaintiff had a claim against the Iranian government, and this package contained legal documents that had to be received by a certain date at the Peace Palace in the Hague for the claim to be maintained. Plaintiff argued that defendant was liable because its employees had informed plaintiff's attorney that the package would arrive on time.

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[9] See Note 4, *supra*.

After determining that the Warsaw Convention applied, the court held that plaintiff had no cause of action under Article 19 because of language in the airway bill which stated "due to the nature of the business, Purolator cannot guarantee delivery by a stipulated date or by a stipulated time, nor shall Purolator be liable for the consequences of delay. . ." While *Jahanger* concerned delay of a package instead of passengers, there is no distinguishable difference in terms of liability under Article 19. The court in *Jahanger* found that the airway bill language did not run afoul of Article 23 prohibition on limiting liability.[10] Accordingly, at least one federal court has found that carriers are permitted to condition liability for delay under Article 19 by contract.

(a) INTERPRETATION OF ARTICLE 19 TO THE WARSAW CONVENTION

In order to understand the meaning of legislation or treaties, reference should be made to the minutes from the conference at which the document was drafted. Justice Sandra O'Connor in a recent United States Supreme Court Opinion, *Air France v. Saks*, — U.S. —, 84 L.Ed.2d 289, 105. S.Ct. 1338 (1985), found the meaning of "accident" in Article 17 of the Warsaw Convention to be consistent with the negotiation history of the Convention. Justice O'Connor acknowledged in interpreting a treaty, it was proper to refer to the records of its drafting and negotiation, *Id.*, citing, *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 431 (1943).

The treaty that became the Warsaw Convention was first drafted at an international conference in Paris during 1925.

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[10] See Note 8, *supra*.

The draft was prepared following the First International Conference on Private Aeronautical Law, the Paris Conference in October of 1925. A committee was established at that conference which in the years preceding the 1929 conference met and drafted the preliminary document. This committee was entitled Comite Internationale Technique d'Experts Juridiques Aeriens (CITEJA).[11]

In the report from the CITEJA committee (Minutes, pp. 251- 255), it was stated that the principal of liability in the event of delay was maintained so that the carrier was not free to deliver the goods or have the passenger arriving according to the "carrier's own pleasure". This report from the CITEJA was presented in written form to the delegates at the Warsaw Conference.

Each country present at the conference had an opportunity to submit its recommendations and proposed amendments. Amendments pertinent to liability in the case of delay, were presented by the British, German, Polish and Hungarian delegations. These are found in the Warsaw Minutes, pages 276, 289, 296, 301-303, 307, 315, 319-322. During the conference in Warsaw, discussions were held in the General Session meetings, comprised of all of the

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[11] This preliminary draft was the result of the CITEJA efforts and the 1925 discussions held at the First International Conference in Paris. Prior to the 1929 Warsaw Conference, this preliminary draft was submitted to the Conference participants giving them an opportunity to review the articles and present recommendations. The Second International Conference then convened in Warsaw in 1929 and minutes from that conference were translated into English in 1975. International Conference on Air Law Affecting Air Questions, Minutes, Second International Conference on Private Aeronautical Law, October 4-12, 1929 (R. Horner & D. Legrez trans. 1975).

delegates. At the seven general session meetings, questions and comments were made on each of the articles presented in the preliminary draft prepared by the CITEJA.

It was in the Seventh Session, the final day of the conference, that Article 21 was changed, renumbered and presented as Article 19.

Article 19 of the Warsaw Convention provides:

> "The carrier shall be liable for damages occasioned by delay in the transportation by air of passengers, baggage, or goods." (Warsaw Minutes at 207).

As originally presented to the convention in Warsaw, then Article 21 provided:

> "The carrier shall be liable for damages sustained during carriage:
>
> * * *
>
> (c) in the case of delay suffered by a traveler, goods, or baggage." (Warsaw Minutes at pp. 264-265).

The discussions of damages for delay took place during the Third Session (Warsaw Minutes pp. 55-58). The Reporter of the CITEJA committee discussed the difference between the circumstance where the period of time for carriage was stipulated and where there was no time period. The Committee retained liability for delay in Article 21, but it was believed where no period was stipulated, a reasonable time was to be implied by the judge.

Following the comments by the CITEJA Reporter, Sir Alfred Dennis, the lead delegate from Great Britain spoke to the General Session participants. Sir Dennis indicated agreement with the comments of the Reporter that the carrier should not have the ability or right to delay

passengers at will. Alluding to the liability imposed on railroads, Sir Dennis stated it was reasonable to impose certain conditions upon air carriers. Sir Dennis asserted that even these conditions could be avoided if the carrier stated "'Here is our timetable, but we don't guarantee that our aircraft will arrive exactly at the hour indicated there is herein something which makes sense and if the air carriers put this condition in the contract, *delay is no longer involved*, except, of course, for exceptional and unreasonable delay.'' (Emphasis added, Warsaw Minutes p. 55).

As an appendix to the proposal submitted by Great Britain, the European air carriers, represented by the International Air Traffic Association, submitted a letter objecting to the language in the preliminary draft, relating to this liability for delay. (Warsaw Minutes pp. 301-303). In this letter, the IATA suggested maritime law granted to carriers and passengers and/or shippers the right to enter contractual relationships or transportation and there was no reason to hold air transportation to a stricter standard. It also argued there was no reasonable ground for depriving air carriers of the ability to stipulate special conditions or to take a special contract covering the question of delay. This special contract would allow carriers, if they accept the contract for particular delivery, to thereby take into account extra costs, and contract for insurance for protection against losses which might be incurred. The IATA recommended either the complete elimination of Article 21(c) or requested a decision be made that the clause related only to cases in which by agreement a stipulation was inserted into the contract of carriage.

In addition to the comments of Sir Dennis, a British solicition, comments were made by Mr. Richter, of the Ministry of Justice in Germany, Mr. Babinski of Poland,

Mr. Rippert, a professor of law in France and Mr. Arendt, Honorary President of the High Court of Justice in Luxembourg. These gentlemen were well aware of the legal consequences for the language found in the Convention.

Following the comments of Sir Dennis, Mr. Richter concurred that the principal of liability for delay should be retained though the parties should be permitted to "insert an exoneration clause". The Hungarian delegate declared his agreement with the comments of the German delegation in demanding that the principal of liability in the case of delay be retained. However, the Hungarian delegate stated that the Warsaw Convention should include an *express* provision for the mitigation of that liability where the delay could not have been avoided.

Although the CITEJA committee believed a judge should have the discretion to determine liability for delay when no period of time was stipulated, the Polish delegation asserted this was not appropriate. Instead, the Polish delegate requested that a different limit of liability be established for mere delay than for damages because of death or injury to passengers. Also, the Polish delegate suggested the elimination of the words "by a traveler" from Article 21(c) because of problems perceived in "innumerable trials and difficulties of proof."

Echoing the comments of Sir Dennis, the Polish delegate made a comparison to railroads and remarked that there was no such liability for damages sustained by a delayed railway traveler. Therefore, there was no reason to create liability for air carriers.

The final comments on this article came from Mr. Rippert of France. The Convention was recorded and conducted in French, and therefore, Rippert's comments, particularly in coming immediately before the vote on the

adoption of this portion of the article should be accorded great weight. Mr. Rippert suggested that the question of delay had not really been understood by air carriers nor the delegates as indicated in the submitted amendments. Rippert acknowledged that a convention such as the Warsaw Convention had to include a provision that the carrier was liable for delay since air carriage by its very nature was more rapid than other means of transportation. Rippert stated that "liability for delay", was intended for the circumstance where the air carrier left goods under a hanger and did not forward them in good time. This was similar to the liability of ordinary carriers. He emphasized that air carriers should be held to a similar standard of liability as other carriers by land or sea. The Convention, remarked Rippert, says nothing more than that carriers can stipulate a period of time for carriage, and upon including a provision forewarning the interested parties, either passengers or shippers, there will be *no liability* for delay. Rippert stated:

> "There is, for the carriers, a very simple means of never being late: In Article 8 it is indicated that the carriers are free to stipulate a period of passage and to insert it in the waybill or on the ticket. When an air carrier fears not being able to provide carriage within four or five days, he need only add 'a carriage in such and such days at most', and the interested parties are warned. But what is inadmissable is that a company promise rapid transport, that it set up a timetable, and that it not be liable when it has not taken reasonable measures to avoid this delay." (Warsaw Minutes at 57).

It is evident therefore, that each of the delegates making comments before the Third General Session at the Warsaw Conference, discussed liability for delay, *not* in an *absolute* sense but in terms of foreseeability and warning to the passenger or shipper. The carrier had to place in the contract of carriage any conditions to liability for delay in transportation, or be subject to liability Article 21, adopted as Article 19 of the Warsaw Convention.

These explanations and clarifications regarding the meaning of the language in Article 21(c) on the question of damages for delay, answered the objections of the delegates. The article was adopted in the Third Session by a 17 to 2 vote. During the Seventh Session, the present Article 19 language was unanimously adopted. The article was understood as maintaining the *same* standard of liability for common carriers in dealing with air carriers. Accordingly, air carriers were allowed to provide in the contract of carriage conditions that were appropriate.

There was no guarantee or contractual promise that the flight would depart Birmingham at 12:30 p.m. on March 11. Trans International Airlines provided in the contract of carriage, the ticket jacket, that the departure time listed was "for informational purposes only". This contract of carriage, including the charter tariff filed with the CAB and the Charter Agreement, provided that the carrier was obligated to depart from Birmingham, Alabama within 48 hours of the scheduled time for departure listed on the ticket jacket. Undisputed testimony at trial confirmed that departure took place within 32 or 33 hours of the scheduled departure time. Therefore, as a matter of law, the contract of carriage was not breached. The contract for flight provided there was no delay if departure occurred within 48 hours of the scheduled departure time.

As a matter of law, no delay has occurred within the meaning of Article 19 of the Warsaw Convention.

Accordingly, the Alabama Supreme Court acted improperly in reversing the lower court's directed verdict in favor of Trans International Airlines and against the respondents, tour participants.

CONCLUSION

Certiorari should be granted.

Respectfully submitted,

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APPENDIX

THE STATE OF ALABAMA ------ JUDICIAL DEPARTMENT
THE SUPREME COURT OF ALABAMA
OCTOBER TERM, 1985-86

Virginia Newsome, et al.

84-484 *v.*

Trans International Airlines, et al.

and

Craig Kuechenmeister, et al.

84-835 *v.*

Trans International Airlines, et al.

Appeals from Jefferson Circuit Court

ADAMS, JUSTICE.

These appeals are from a judgment based on directed verdicts for the defendants in consolidated breach of contract actions brought as a result of the delay in departure of an international flight from Birmingham, Alabama to Europe.

Defendant Mable Forrester, d/b/a Sky III Enterprises and Ambassadors Abroad, organized a European charter tour and solicited the plaintiffs' participation in the tour through advertisement. As the tour operator, Forrester contracted with defendant Trans International Airlines (hereinafter "TIA") to provide a round-trip charter flight for the plaintiffs aboard TIA aircraft from Birmingham, Alabama, to Milan, Italy, and Athens, Greece.

The flight from Birmingham to Europe was scheduled to depart from the Birmingham airport at 12:30 p.m., March 11, 1979, but, because of mechanical difficulties with TIA's original chartered aircraft, as well as with a replacement aircraft, departure was delayed until approximately 8:30 p.m., March 12, 1979; a delay of about 32 hours. The flight to the European destinations, as well as the return flight to the United States, was uneventful. However, the plaintiffs' tour of Europe was shortened by the delay in departure.

As a result of the delay in departure, two separate classes of plaintiffs brought breach of contract class action suits against TIA and Forrester in the Circuit Court of Jefferson County, Alabama. The Newsome plaintiff class was originally represented by Virginia Newsome and is composed of the tour participants who were transported to Italy. The Kuechenmeister plaintiff class is represented by Craig Kuechenmeister, and is composed of the tour participants who were transported to Greece, following a stopover in Italy. The two cases were consolidated for trial and subsequently certified as class actions on October 6, 1981.

The plaintiffs sought compensatory damages for the delay of the TIA charter flight, alleging that the delay was a breach of the charter contract and resulted in the plaintiffs' missing valuable portions of their tour and substantially impaired the tour's value to them. Forrester cross-claimed against TIA, alleging that TIA had breached its contract of carriage with her by failing to furnish the tour transportation at the time agreed.

The consolidated actions proceeded to trial, and at the close of the plaintiffs' case the court granted TIA's motion for directed verdict on plaintiffs' breach of contract claim,

as well as on Forrester's cross-claim. Forrester's motion for directed verdict against the plaintiffs' claims against her was also granted by the trial court. Following the trial court's denial of plaintiffs' motion for new trial, the plaintiffs filed timely notices of appeal to bring this matter before this Court. Forrester has not appealed the trial court's adverse ruling on her cross-claim.

The issue to be resolved is whether the trial court erred by directing verdicts in favor TIA and Forrester on plaintiffs' contract claims. We are of the opinion that the trial court did err by granting a directed verdict for TIA, and we reverse its judgment as to TIA. We affirm judgment based on the the directed verdict for Forrester.

I.

TIA'S Directed Verdict

The plaintiffs contend that the trial court erred in granting TIA's directed verdict motion based upon the trial court's finding that there was no contract breach by TIA because of an alleged limitation of liability for delay provision incorporated by reference into the contract between TIA and the plaintiffs. We agree.

TIA and the plaintiffs are in agreement that the contract of carriage which is the basis of the plaintiffs' contract action against TIA is evidenced by the passenger ticket.[1]

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[1] Actually, there are three contractual relationships: the relationship between TIA and Forrester created by the charter agreement; the relationship between Forrester and the tour participants created by the various brochures and other documents distributed by Forrester; and the relationship between TIA and the tour participants, which is evidenced by the airline ticket. For the resolution of the issues raised in these

The passenger tickets issued by TIA for the plaintiffs' flight contained the following statement:

> To the extent not in conflict with the foregoing, carriage and other services performed by the carrier are subject to (1) the provisions contained in this ticket, (2) applicable tariffs and (3) carrier's Conditions of Carriage and related regulations which are made part hereof.

Section (2) of that statement incorporates into the contract by reference applicable tariffs that TIA is required to file with the Civil Aeronautics Board (C.A.B.).[2] *See* 14 C.F.R. § 382 *et seq.* Once a tariff is filed with the C.A.B., it becomes a part of the contract of carriage. *Eastern Airlines v. Williamson*, 382 Ala. 421, 211 So. 2d 912 (1968).

Pursuant to C.A.B. requirements, TIA had in effect certain rules contained in a charter tariff filed with the C.A.B. and in effect at the time of the plaintiffs' flight. Central to the trial court's decision was Rule No. 20(b) of TIA's Charter Tariff, which states:

> *Departure Flight Delays*: In the case of flight delays of more than forty-eight (48) hours beyond the departure time stated in the charter contract, TIA, upon request and at the charterer's option,

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appeals, we are concerned only with the separate relationships between the tour participants with TIA and with Forrester. We are not concerned here with the relationship between TIA and Forrester created by the charter agreement.

[2] The Airline Deregulation Act of 1978, Pub. L. No. 95-504, § 40, 92 Stat. 1705, 1744 (1978), terminated the Civil Aeronautics Board as well as some provisions of the Federal Aviation Act of 1958, 49 U.S.C. 1301 *et seq.* (1976). The administration of other provisions of the Federal Aviation Act have been transferred to other federal agencies.

will provide alternative air transportation at no additional cost to the charterer.

TIA promulgated this tariff to meet requirements of C.A.B. regulations codified at 14 C.F.R. § 208.32(a) (1985). Section 208.32(a) reads in pertinent part:

> Flight delays and substitute air transportation (foreign). Charter air carriers shall comply with the following requirements for passenger service in foreign air transportation. These requirements shall be without prejudice, and in addition, to any other rights or remedies of passengers under applicable law:
>
> (a) *Substitute air transportation.* (1) On all charter flights, unless the air carrier causes an aircraft to finally enplane each passenger and commence the takeoff procedures at the airport of departure before the 48th hour following the time scheduled for the departure of such flight, it shall provide substitute transportation in accordance with the provisions of this paragraph.
>
> (2) As soon as the air carrier discovers, or should have discovered by the exercise of reasonable prudence and forethought, that the departure of any such charter flight will be delayed more than 48 hours, such air carrier shall arrange for and pay the costs of substitute air transportation for the charter group on another charter flight, operated by any other carrier or foreign air carrier.
>
> (3) When neither the charter transportation contracted for nor substitute transportation has been performed before the expiration of 48 hours following the scheduled departure time of any

such charter flight, the charterer, or his duly authorized agent, may arrange for substitute air transportation of the members of the charter group, at economy or tourist class fares, on individually ticketed flights and the chartered air carrier shall pay the costs of such air transportation to the substitute air carrier or foreign air carrier.

(4) In determining the period of time during which the departure of a charter flight has been delayed within the purview of this paragraph, periods of delay caused by the prohibition of flights to or from the airport of departure because of weather or other operational conditions affecting such airport shall be excluded if, and while, the air carrier has available an airworthy aircraft which is capable of transporting the charter group in a condition of operational readiness.

TIA contends that once its tariffs are filed with the C.A.B., the tariffs are the exclusive provisions by which the rights and liabilities of the carrier and passengers are governed. *See Tishman & Lipp, Inc. v. Delta Airlines*, 413 F.2d 1401 (2d Cir. 1969).

Based upon the foregoing facts and principles, TIA argued to the trial court, and argues again here, that TIA's tariff, filed pursuant to 14 C.F.R. § 208.32(a) and incorporated into TIA's contract of carriage, exclusively limits TIA's liability for the flight delay experienced by the plaintiffs in the instant case to providing substitute air transportation and incidental expenses, if, but only if, the flight delay is 48 hours or longer. The delay of the TIA charter at issue here was only about 32 hours, and,

therefore, TIA asserts that there was no breach of the contract with plaintiffs and that a directed verdict was in order.

The trial court stated in the record:

> The Court's of the opinion, whether I agree with it or not, that this is an area that is controlled by the Federal Regulations because of the commerce aspect of it and interstate commerce. And that the regulations, the tariff, and the operation of law operating together provide that the carrier, in this case TIA, is not liable for flight delays of departure as provided by this contract for less that 48 hours under the circumstances that have been shown here. The motion for directed verdict for TIA is granted.

The plaintiffs contend that the trial court erred in its ruling because (1) the C.A.B. regulation at 14 C.F.R. § 208.32(a) is not intended to be the exclusive remedy afforded to the plaintiffs in this action, but is in addition to remedies recognized under federal treaty law and state common law; and (2) 14 C.F.R. § 208.32(a) cannot be the exclusive remedy for defendants' breach of contract claim because the remedy would be in fatal conflict with the terms of the Warsaw Convention[3] — a federal treaty which

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[3] The Warsaw Convention ("the Convention"), formally titled the "Convention for the Unification of Certain Rules Relating to International Transportation by Air," was created on October 12, 1929, and was adhered to by the United States in June 1934. An English translation is published at 49 Stat. 3014 (1934), and also reprinted in T.S. No. 876, 137 L.N.T.S. 11, and 49 U.S.C. § 1502 note (1976). The original Convention is modified by the "Agreement Relating to Liability Limitation of the Warsaw Convention and the Hague Protocol" ("the Montreal Agreement"), CAB 18900 31 Fed. Reg. 7302 (1966), note following 49 U.S.C. app. § 1502 (1982).

supersedes any conflicting tariff filed pursuant to C.A.B. regulations.

A. Exclusivity of Remedy

We are of the opinion that the 48-hour provision of 14 C.F.R. § 208.32(a), which was essentially incorporated by reference into TIA's contract of carriage by the tariff provision filed with the C.A.B., is not the exclusive remedy afforded to plaintiffs in the instant case, but, rather, that the provision allows the plaintiffs additional rights that may arise from federal treaty or state common law. The provision at 14 C.F.R. § 208.32(a) was promulgated pursuant to authority granted by the Federal Aviation Act, Pub.L. 85-726, 72 Stat. 737 (1958) (codified as amended at 49 U.S.C. § 1301 *et seq.* (1976)). A federal administrative regulation should be construed so as to carry out the intent of the enacting body. *United States v. Miller*, 303 F.2d 703, *cert. denied*, 83 S.Ct. 507, 371 U.S. 955, 9 L.Ed 2d 502 (9th Cir. 1962). Section 1506 of the Federal Aviation Act provides: "Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." 49 U.S.C. § 1506 (1976). The Court in *Brunwasser v. Trans World Airlines, Inc.*, 541 F.Supp. 1338, 1345 (W.D. Pa. 1982), made the following observation about § 1506:

> While federal regulation of air travel is extensive[,] it is not exclusive. Quite the contrary[,] federal law specifically preserves legal remedies for air travelers beyond those set forth in the Federal

> Aviation Act. . . . [49 U.S.C. § 1506] recognizes that the statutory scheme established by the Federal Aviation Act is designed merely to complement existing statutory and common law remedies, not to supplant them. Moreover, it is clear that 49 U.S.C. § 1506 applies to remedies arising under state law as well as those created by federal law.

To hold that 14 C.F.R. § 208.32(a) is an exclusive remedy for delays in international charter flights would directly conflict with the clear Congressional intent expressed in § 1506. Surely, the C.A.B. in promulgating the regulation did not intend to create such an obvious conflict. Moreover, we are obligated to look to the plain meaning of the regulation's language in construing its effect. *United States v. Miller, supra.* The second sentence of § 208.32(a) specifically states:

> These requirements shall be without prejudice, and in addition, to any other rights or remedies of passengers under applicable law.

We can reach no other conclusion than that the remedy provided in § 208.32(a) is cumulative to other rights and is not exclusive.

In addition, a court, whenever possible, should avoid a construction of a regulation that would raise doubt as to the regulation's validity or hinder its ability to make its statutory authority operative. *Northern Natural Gas Co. v. O'Malley,* 277 F.2d 128 (8th Cir. 1960). As will be discussed below, a holding that the remedy embodied in 14 C.F.R. § 208.32(a) is exclusive would create conflict with the Warsaw Convention, a duly entered self-executing federal treaty, *Trans World Airlines, Inc. v. Franklin Mint Corp.,* ___ U.S. ___, 104 S.Ct. 1771, 8 L.Ed.2d 273 (1984), that

is, the supreme law of the land. U.S. Const. Art. VI; *see also Butler's Shoe Corp. v. Pan American World Airways, Inc.*, 514 F.2d 1283 (5th Cir. 1975).

B. Conflict With Warsaw Convention

The application of the Warsaw Convention to international flights is governed by the contract of carriage between the carrier and passenger, and, as previously mentioned, the contract of carriage between the plaintiffs and TIA in the instant case is evidenced by the passenger ticket.[4] *See In Re Crash in Bali, Indonesia*, 462 F.Supp. 1114 (C.D. Cal. 1978). The passenger tickets in the instant case expressly incorporated the terms of the Warsaw Convention by the following language:

> WARSAW CONVENTION. Carriage hereunder is subject to the rules and limitations relating to liability established by the Warsaw Convention unless such carriage is not "International Carriage" as defined by that Convention.

There is no dispute that the plaintiffs' flight was "international," as that term is defined by Article 1, § 2 of the Convention. We must now determine what effect the

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[4] In *Block v. Compagnie Nationale Air France*, 386 F.2d 323 (5th Cir. 1967), the court opined that the ticket itself is not the contract between carrier and passenger, but evidences the contractual relationship which arises once the carrier promises to transport the passenger and the passenger consents to the transportation.

Whether the flight comes within the scope of the Convention is governed by the points of departure and arrival, as explained in Article 3(2) of the Convention.

Moreover, it is clear from *Block* that the terms of the Convention apply regardless of the fact that the transportation is by air charter.

application of the Convention has upon the liability limitations embodied in TIA's tariffs that were incorporated by reference into the passenger tickets.[5]

The plaintiffs contend that the Warsaw Convention provides a cause of action against TIA and that Article 19 of the Convention makes TIA liable for damages occasioned by all delays in the transportation of passengers unless TIA proves that it took all necessary measures to avoid the damage or that it was impossible for the airline to take such measures, as is provided in Article 20, § 1, of the convention.[6] The plaintiffs contend that the trial court's

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[5] The following rules and Regulations embodied in "Trans International Airlines, Inc., Charter Tariff No. WW-1," effective November 12, 1978, are those relevant portions of the tariff relied upon by TIA in the instant case:

Rule No. 20(2)(B)

Departure Flight Delays: In the case of flight delays of more than forty-eight (48) hours beyond the departure time stated in the charter contract, TIA, upon request and at the charterer's option, will provide alternative air transportation at no additional cost to the charterer.

Rule No. 33

LIMITATION OF LIABILITY - PASSENGERS

(A) *General*: As between TIA and the charterer, TIA shall be liable only for direct damage occasioned by its negligence, or the negligence of its officers, agents, servants or employees, but shall not be liable for special or consequential damages including, but not limited to, loss of services, nor in any event shall TIA be liable to the charterer for any loss or damage resulting from delays due to mechanical difficulties, weather or conditions beyond TIA's control.

[6] The English translation of Articles 19 and 20 of the Convention reads as follows:

Article 19

The carrier shall be liable for damage occasioned by delay in the transportation by air of passengers, baggage, or goods.

Article 20

(1) The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.

(2) In the transportation of goods and baggage the carrier shall not be liable if he proves that the damage was occasioned by an error in piloting, in the handling of the aircraft, or in navigation and that, in all other respects, he and his agents have taken all necessary measures to avoid the damage.

49 U.S.C. § 1502 note (1976).

Prior to the promulgation of the Montreal Agreement (*see* note 2 of this opinion), Article 20 § 1, above, provided a defense to the carrier to claims arising from the death of, or injury to, passengers. Pursuant to the Montreal Agreement, a carrier may not avail itself of this defense if it wishes to be protected by the limitations of liability set forth in the Montreal Agreement.

We note that the Montreal Agreement was concerned only with damages related to personal injury and death of passengers and does not speak to the damages recoverable or the continued applicability of Article 20(1) as a defense for claims due to flight delays. We therefore conclude that the original liability limitation of Article 22, below, as well as the defense available under Article 20(1), continues in effect for claims for flight delays.

In addition to Articles 19 and 20, we find the following Articles of the Convention applicable in the case at bar:

Article 22

(1) In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs [approximately $8,300.00 U.S. dollars].

Article 23

Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this convention shall be null and void, but the nullity of any such provision shall not involve the nullity of the whole contract, which shall remain subject to the provisions of this convention.

application of 14 C.F.R. § 208.32(a) to limit TIA's liability for flight delays to providing alternate transportation and incidental expenses, and, then, only if the original departure time is delayed by 48 hours or more, was error, because, they argue, such a limitation of liability flies in the face of the liability imposed by Article 19 and the prohibition of liability limitations set out in Article 23 of the Convention.

TIA argues that the remedy embodied in 14 C.F.R. § 208.32(a) is not inconsistent with Article 19 of the Convention, but is a consistent supplementation permitted by the Convention and envisioned by the Convention drafters. TIA asserts that the Convention does not define "delay," as that term is used in Article 19, and that the various states that have ratified the Convention are free to specify and define what constitutes "delay" under Article 19. TIA contends that the C.A.B. has, in effect, through 14 C.F.R. § 208.32(a), defined "delay" to be failure to depart within 48 hours of the appointed departure time. Therefore, TIA argues, the reference to 14 C.F.R. § 208.32(a) in TIA's tariff, incorporated into the contract of carriage, precludes any remedy for its passengers until more than 48 hours has passed from the scheduled departure times.

Although we agree with TIA that 14 C.F.R. § 208.32(a) is not inconsistent with the provisions of the Warsaw Convention, we are unable to accept the strained construction of the regulation put forward by TIA. Neither the unambiguous language of Article 19 of the Convention nor the language of the regulation supports TIA's

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Article 24

(1) In the cases covered by articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.

49 U.S.C. § 1502 note (1976).

contention that 14 C.F.R. § 208.32(a) can, or that it in fact does, define "delay" so as to, in effect, limit TIA's liability.

We have carefully analyzed the minutes of the Convention pertaining to the adoption of Article 19, and the discussions rendered therein do not lead us to conclude that the delegates intended that Article 19 be supplanted in the fashion contemplated by TIA. However, we pretermit a lengthy and complicated discussion addressed to this point by simply observing that the clear language of 14 C.F.R. § 208.32(a) does not define, nor does it reflect an intention to define, the term "delay". As previously noted, § 208.32(a) states: "These requirements shall be without prejudice, and in addition, to any other rights or remedies of passengers under applicable law."

We have previously concluded that the Warsaw Convention applies to the facts of the instant case, and, therefore, we must conclude that the plaintiffs are free to assert any rights or remedies available to them pursuant to the Convention or other applicable law, regardless of the remedy afforded by 14 C.F.R. § 208.32(a). The trial court erred by granting TIA's directed verdict motion.

C. Preclusion of Common Law Remedies

In light of our determination that the Convention is applicable in the instant case, what remedies are afforded plaintiffs by the Convention and by state common law?

Plaintiffs argue that despite the applicability of the Warsaw Convention and 14 C.F.R. § 208.32(a) to the case at bar, these provisions do not preclude the plaintiffs from asserting a common law cause of action for breach of contract. We disagree.

The issue here was addressed by the Fifth Circuit Court of Appeals in *Boehringer-Mannheim Diagnostics, Inc. v. Pan American World Airways*, 737 F.2d 456, 458 (5th Cir. 1984). The issue was framed in that case as:

> [W]hether the Convention provides the exclusive liability remedy for international air carriers by providing an independent cause of action, thereby preempting state law, or whether it merely limits the amount of recovery for a cause of action otherwise provided by state or federal law.

The *Boehringer* court joined the Courts of Appeals for the Second, Third, and Ninth Circuits in holding that the Warsaw Convention creates a cause of action and is the exclusive remedy. *See Benjamins v. British European Airways*, 572 F.2d 913 (2d Cir. 1978); *Abramson v. Japan Air Lines Co.*, 739 F.2d 130 (3d Cir. 1984); *In re Mexico City Air Crash of October 31, 1979*, 708 F.2d 400 (9th Cir. 1983). The result of these recent holdings is to make the theories of recovery and limitations of liability set out in the Convention exclusive, thereby preempting state common law causes of action in situations in which the Convention applies. When the Convention does not apply, liability and damages limitations are established in accordance with common law rules. These holdings were predicated upon the courts' recognition that the Convention was intended to be a binding uniform international body of air law and the conclusion that a uniform and consistent theory of liability embodied in a cause of action founded upon the Convention itself is consistent with the Conventions' goal of uniformity.

We are persuaded by the consistent position taken by the courts of the several circuits that have addressed this issue, and, in the absence of any direct holding on this issue by the Eleventh Circuit Court of Appeals, we are inclined to

follow the decisions of these other four circuits. The plaintiffs in the instant case have a cause of action derived exclusively from the Convention, and, therefore, all state common law causes of action that might otherwise have been available to plaintiffs are preempted.

D. Delivery of Tickets

Plaintiffs argue that if the Convention is applicable to the case at bar, TIA should not be able to rely upon the liability limitations provisions of the Convention because the plaintiffs' tickets were not "delivered" to the plaintiffs as required by Article 3 of the Convention.

If TIA did not deliver a ticket to each plaintiff, recovery is not restricted by Convention limitations of liabiliity of Article 22. *Mertens v. Flying Tiger Lines, Inc.*, 341 F.2d 851 (2d Cir. 1965).

Article 3, § 2 of the Convention provides:

> The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability.

The several courts that have interpreted this provision have generally concluded that "delivery" requires that passengers be afforded a reasonable opportunity to examine the ticket far enough in advance of departure to be able to be apprised of the limitations of the Convention and to be able

to take measures to protect themselves from the limitations. *See, e.g., Warren v. Flying Tiger Lines, Inc.*, 352 F.2d 494 (2d Cir. 1965); *Mertens v. Flying Tiger Lines, Inc.*, 341 F.2d 851 (2d Cir. 1965); *DeMarines v. KLM Royal Dutch Airlines*, 580 F.2d 1193 (3d Cir. 1978); *Domanque v. Eastern Airlines, Inc.*, 531 F. Supp. 334 (E.D. La. 1981).[7] Whether a ticket has been delivered, as required by the Convention, is a question to be answered by the jury based upon the factual circumstances of each case as gleaned from the evidence. *Mertens, supra.* The record in the case before us reflects a disputed factual issue regarding the timely delivery of tickets to the plaintiffs. The determination of this issue is for the jury.

II. Forrester's Directed Verdict

The trial court directed a verdict in favor of Forrester, relying upon language contained in the tour brochures issued to the plaintiffs. The relevant language reads as follows:

> RESPONSIBILITY: SKY III ENTERPRISES, the tour operator and/or the selling agent, their representatives (designated Tour Leaders and Faculty), act only as agent for the tour members in making arrangements for hotels, transportation, sightseeing, restaurant or any other services in connection with this itinerary and they will exercise reasonable care in making such arrange-

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[7] Although the delivery issue raised in the above cited cases was dealt with in relation to claims based on personal injury or death of passengers arising under Article 17 of the Convention, we see no bases for not applying the requirement of delivery under Article 3, § 2, to the provisions of Article 19 concerning delay.

> ments. However, they do not assume any liability whatsoever, for any injury, damage, loss, accident or delay to person or property due to any act or default of any hotel, carrier, restaurant, company or person rendering any of the services included in the tour program. . . . Sky III Enterprises, the Tour Leaders and/or instructors and the tour operator(s) and any selling agent shall be rendered faultless and not responsible for any type of injury whatsoever, and will accept no responsibility for any damage or delay due to sickness, pilferage, labor disputes, machinery breakdown, quarantine, government restraints, weather or any other cause beyond their personal control. The right is reserved to cancel or change itineraries. . . . In the event that services and accommodations set forth in the brochure cannot be supplied due to delays, acts, omissions, or other causes beyond its control, the operator shall use its best efforts to supply comparable service and accommodations.
>
> . . . .
>
> INSURANCE; In view of statutory or contractual limitations which may apply to personal injury or property damage losses, the PURCHASE OF ACCIDENT AND BAGGAGE INSURANCE is strongly recommended. Details may be obtained from your Tour leader.

There was no evidence at trial that any plaintiff failed to receive documents including this provision.

Plaintiffs do not contend that this language was not a part of their contract with Forrester, but assert that the language is ambiguous and misleading. Plaintiffs also assert that the language constitutes an unconscionable exculpa-

tory provision which should be denied effect by this Court. We do not agree.

An exculpatory contract provision is one that tends to excuse a defendant from alleged fault. *See Taylor v. Leedy & Co.*, 412 So. 2d 763 (Ala. 1982). In Alabama, a party generally may not contract against the harm caused by his or her own negligence, with certain exception not applicable in the instant case. *See Alabama Great Southern R. Co. v. Sumter Plywood Corp.*, 359 So. 2d 1140 (Ala. 1978). However, the plain language of the disputed contract provision here does not constitute an exculpatory provision. We are of the opinion that the clear and unambiguous wording of the provision merely holds Forrester harmless for certain circumstances, including delay occasioned by machinery breakdowns, *beyond her personal control.* The language does not purport to relieve Forrester for damages to the plaintiffs brought upon by her actions or by events within her personal control.[8] Accordingly, we conclude that

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[8] 14 C.F.R. § 378.1 *et seq.*, revoked and reserved effective January 1, 1979, by amendment No. 22, 43 Fed.Reg. 36, 603 (1978) but applicable to plaintiffs' tour, required Forrester to furnish a surety bond for the protection of the tour members. Forrester met this requirement. TIA argued at trial that plaintiffs' exclusive remedy was against Forrester on her bond, pursuant to § 378, but the provisions of 14 C.F.R. § 378.17 do not support this argument, nor does this section support plaintiffs' contention that the disputed liability limitation provision promulgated by Forrester is unconscionable. 14 C.F.R. § 378.17(h) provides in regard to the contract between the tour operator and tour participants:

> That the tour operator is the principal and is responsible to the participants in making the arrangements for all tour services and accommodations offered as constituting the tour: *Provided, however,* that this requirement shall not preclude the tour operator from expressly providing in such contract that, in the absence of negligence on the part of the

there is no basis for holding the disputed contract language unconscionable.

Having made a thorough examination of the record before us, we are of the opinion that the plaintiffs failed to provide a scintilla of evidence that Forrester breached the contract provision set out above. The record contains ample evidence that the delay of the plaintiffs' charter flight was due to mechanical breakdowns of TIA's aircraft. The plaintiffs have failed to direct us to any evidence within the record that tends to show that Forrester was responsible for the delay of the TIA charter flight or that preventing or *shortening* the delay was within her personal control. In fact, two class representatives called as witnesses at trial testified that they were not aware of anything Forrester could have done to expedite the departure. Both Forrester and Lee Francis, TIA's regional manager, testified that shortly after the initial delay, Forrester requested that alternative transportation be supplied by TIA. Based upon this evidence and the terms of plaintiffs' contract with Forrester, we conclude that the trial court properly directed a verdict in favor of Forrester and against the plaintiffs on their breach of contract claim.

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tour operator, he is not responsible for personal injury or property damage arising out of the act or negligence of any direct air carrier, hotel or other person rendering any of the services or accommodations being offered in such tour.

Clearly, Forrester was permitted by the above regulation to include the exact provision in the tour contract that the plaintiffs object to in the instant case. Also, this provision reflects a clear intent that the remedies afforded under § 378 not preclude claims against air carriers for their negligence.

We affirm that portion of the trial court's judgment in favor of Forrester, but as to that portion in favor of TIA we reverse and remand.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Torbert, C.J., Maddox, Faulkner, Jones, Almon, Shores, and Beatty, JJ., concur.

CIRCUIT COURT, TENTH JUDICIAL CIRCUIT
OF ALABAMA EQUITY DIVISION

FILED IN OPEN COURT
This 29th day of Oct 1984
REGISTER
By Rek E.R.
E.O.D. D.R.

VIRGINIA A. NEWSOME, et al.,

Plaintiffs,

vs. CASE NO. CV 79 504-800 WAT

TRANS INTERNATIONAL AIRLINES, a Transamerica Company; MABEL FORRESTER, individually and d/b/a SKY III ENTERPRISES, "AMBASSADORS ABROAD"; et al.,

Defendants.

FINAL JUDGMENT

This action came on for trial after notice thereof and was submitted on the pleading, orders of the Court heretofore entered, and testimony and evidence presented in open court.

At the close of the evidence of the Plaintiffs the Court granted the motion of the Defendant Trans International Airlines for a directed verdict on the claims of the Plaintiffs and the class of persons they represent.

At the close of the evidence of the Defendant Mabel Forrester, the Court granted the motion for directed verdict of the Defendant Trans International Airlines asserted to the crossclaim of the Defendant Mabel Forrester.

At the close of the evidence of the Plaintiffs the Court granted the motion for directed verdict of the Defendant Mabel Forrester on the claims of the Plaintiffs and the class of persons they represent.

Upon consideration of the matters presented and the rulings of the Court in respect to the said motions, it is ORDERED, ADJUDGED and DECREED by the Court as follows:

1. Judgment is hereby entered for the Defendants Trans International Airlines and Mabel Forrester individually and d/b/a Sky III Enterprises, "Ambassadors Abroad," on the claims of the Plaintiffs and the class of persons they represent. The said class is composed of the persons named on Exhibit A attached hereto.

2. Judgment is hereby entered for the Defendant Trans International Airlines and against the Defendant Mabel Forrester individually and d/b/a Sky III Enterprises, "Ambassadors Abroad," on the crossclaim of the Defendant Mabel Forrester individually and d/b/a Sky III Enterprises, "Ambassadors Abroad."

3. The costs of this action are taxed two thirds (2/3) to the Plaintiffs and one third (1/3) to the Defendant Mabel Forrester.

DONE and ORDERED this 29th day of October 1984.

William A. Thompson
CIRCUIT JUDGE

CIRCUIT COURT, TENTH JUDICIAL CIRCUIT
OF ALABAMA EQUITY DIVISION

FILED IN OPEN COURT
This 29th day of Oct 1984
REGISTER
By Rek E.R.
E.O.D. _____ D.R.

VIRGINIA A. NEWSOME, et al.,

Plaintiffs,

vs. CASE NO. CV 79 504-961 WAT

TRANS INTERNATIONAL AIRLINES, a Transamerica Company; MABEL FORRESTER, individually and d/b/a SKY III ENTERPRISES, "AMBASSADORS ABROAD"; et al.,

Defendants.

FINAL JUDGMENT

This action came on for trial after notice thereof and was submitted on the pleading, orders of the Court heretofore entered, and testimony and evidence presented in open court.

At the close of the evidence of the Plaintiffs the Court granted the motion of the Defendant Trans International Airlines for a directed verdict on the claims of the Plaintiffs and the class of persons they represent.

At the close of the evidence of the Defendant Mabel Forrester, the Court granted the motion for directed verdict of the Defendant Trans International Airlines asserted to the crossclaim of the Defendant Mabel Forrester.

At the close of the evidence of the Plaintiffs the Court granted the motion for directed verdict of the Defendant Mabel Forrester on the claims of the Plaintiffs and the class of persons they represent.

Upon consideration of the matters presented and the rulings of the Court in respect to the said motions, it is ORDERED, ADJUDGED and DECREED by the Court as follows:

1. Judgment is hereby entered for the Defendants Trans International Airlines and Mabel Forrester individually and d/b/a Sky III Enterprises, "Ambassadors Abroad," on the claims of the Plaintiffs and the class of persons they represent. The said class is composed of the persons named on Exhibit A attached hereto.

2. Judgment is hereby entered for the Defendant Trans International Airlines and against the Defendant Mabel Forrester individually and d/b/a Sky III Enterprises, "Ambassadors Abroad," on the crossclaim of the Defendant Mabel Forrester individually and d/b/a Sky III Enterprises, "Ambassadors Abroad."

3. The costs of this action are taxed two thirds (2/3) to the Plaintiffs and one third (1/3) to the Defendant Mabel Forrester.

DONE and ORDERED this 29th day of October 1984.

William A. Thompson
CIRCUIT JUDGE

TRANSAMERICA CORPORATION AND SUBSIDIARIES WITH STATE OF INCORPORATION

Transamerica Corporation

Budget Rent a Car Corporation - Illinois
Budget Rent a Car Systems, Inc. - Delaware
Budget Florida Holding (1984), Inc. - Florida
Budget Rent a Car of Broward, Inc. - Florida
Budget Rent a Car Company of Florida, Inc. - Florida
Budget Rent a Car of Tampa, Inc. - Florida
Budget Rent a Car Distributors, Inc. - Florida
Budget Rent a Car Sales, Inc. - Florida
LMDH, Inc. - Florida
Budget Rent a Car of Nashville, Inc. - Tennessee
Chicago Budget Rental a Car Corporation - Delaware
Deplane Corporation - California
Traverse Corporation - California
Budget Rent a Car International, Inc. - Delaware
Budget Rent a Car (U.K.) Limited - United Kingdom
Budget Rent a Car Southern Africa (pty.) Limited - South Africa
Budget Rent a Car Espana, S.A. - Spain
Budget Rent a Car Italia, Inc - Italy
Budget Rent a Car of Canada Limited - Canada
Budget Leasing Corporation - Delaware
Compass Computer Services Inc. (50% owned by Hilton Hotels) - Delaware
Control Risk Corporation - Illinois
Philip Jacobs Insurance Agency, Inc. - California
Transamerica Reinsurance Company Limeted - Bermuda

*Coast Service Company - California

*Inter-America Corporation - California

James Wigham Poland Holdings Limited - Delaware

JT Management Company, Inc. - Delaware

*LMS Co. - California

*Mortgage Corporation of America - California

Pyramid Insurance Company of Bermuda, Ltd. - Bermuda

*TAFEX Systems Corporation - Delaware

*TCS Inc. - Delaware

Trans International Entities Inc. - Delaware

Trans International Airlines, Inc. - Kentucky

Transamerica Airlines, Inc. - Delaware

Transamerica Travel, Inc. - Delaware

*Transamerica Corporation (Oregon) - Oregon

Transamerica Delaval Inc. - Delaware

AHU Corporation - Texas

Berkely Pump Company International - Delaware

De Laval-Stork V.O.F. (50% owned by Transamerica Delaval Inc.) - Netherlands

Delaval Turbine Canada Ltd. - Canada

De Laval Turbine Gmbh - West Germany

Delaval Turbine International Inc. - Delaware

Transamerica Instruments Gmbh - West Germany

Transamerica Instruments Limited - United Kingdom

Data Laboratories Limited - United Kingdom

Transamerica Instruments S.P.A. - Italy

Transamerica S.A.R.L. - France

Tait, Inc. - Ohio

Berkeley Pump Company - Delaware

Pumptron Industries Inc. - Canada

Transamerica Delaval Electronic Systems Inc. - Delaware
WEKA, A.G. - Switzerland
AB.T. Burship - Switzerland
Del Sales Company - Virgin Islands
Transamerica Equiptment Leasing Company, Inc. - Delaware
Transamerica Financial Corporation - Delaware
Pacific Agency, Inc. - Indiana
Pacific Finance Loans - California
Transamerica Financial Consumer Discount Company - Pennsylvania
Transamerica Financial Corporation - Nevada
Transamerica Financial Services - California
Transamerica Financial Services - Wyoming
Transamerica Financial Services Company - Ohio
Transamerica Financial Services, Inc. - Alabama
Transamerica Financial Services, Inc. - Arizona
Transamerica Financial Services, Inc. - Kansas
Transamerica Financial Services, Inc. - New Jersey
Transamerica Financial Services, Inc. - Texas
Transamerica Financial Services (Inc.) - Oklahoma
Transamerica Financial Services of Dover, Inc. - Delaware
Transamerica Industrial Loan Company - Washington
Transamerica Savings and Loan Association - California
Transamerica Title Insurance Company - California
Transamerica Real Estate Tax Service - California
Transamerica Homes, Inc. - Delaware
Transamerica Informationm Services Corporation
Transamerica Insurance Corporation of California - California

Arbor Life Insurance Company - Arizona
Crown Valley Insurance Agency, Inc. - California
Plaza Insurance Sales, Inc. - California
Transamerica Advisors, Inc. - California
Transamerica Annunity Service Corporation - New Mexico
Transamerica Assurance Company - California
Transamerica Consultants, Inc. - California
Transamerica Financial Resources, Inc. - Delaware
Transamerica Financial Systems & Concepts, Inc. - California
Transamerica Insurance Company - California
The Canadian Surety Company - Canada
Countrywide Corporation - Texas
Industrial County Mutual Insurance Company - Texas
Transamerica Indemnity Company - California
Transamerica Insurance Company of Texas - Texas
Transamerica Insurance Company of Michigan - Michigan
Transamerica Insurance Company of New York - New York
Transamerica Insurance Corporation of America - Michigan
Transamerica Premier Insurance Company - California
Automotive Insurance Company - California
Countrywide Insurance Company - California
Transamerica International Management, Inc. - California
Transamerica Lloyds Insurance Company - Texas
Transamerica Insurance Management, Inc. - California
Transamerica Insurance Securities Sales Corporation - Maryland
Transamerica International Insurance Services, Inc. - Delaware

Occidental International Holdings N.V. - Netherlands
Regency Life Assurance Company Limited - United Kingdom
Occidental Life Assurance Company of Australia, Limited - Austrialia
Transamerica Transamerica Occidental Life Insurance Comapny - California
First Transamerica Insurance Company - New York
*Lireas Holdings Limited - South America
Transamerica International Insurance Services, Inc. - California
Transamerica Life Insurance and Annuity - California
Transamerica Life Insurance Company of Canada - Canada
Transamerica Occidental Life Insurance Company of Illinois - Illinois
Transamerica Products, Inc. - California
Transamerica Products I, Inc. - California
Transamerica International Holdings, Inc. - Delaware
*Transamerica International Limited - Canada
Transamerica Interway Inc. - Delaware
Schanno Transportation, Inc. - Minnesota
Terminal Maintenance, Inc. - Minnesota
Transamerica Distribution Services, Inc. - Delaware
Transamerica ICS Inc. - Delaware
I.C.S. Freight Services Inc. - Delaware
ICS Traffic Services, Inc. - Delaware
Intermodal Equiptment Inc. - Delaware
Transamerica ICS N.V. - Belgium
Transamerica ICS Srl. - Italy
Transamerica I.C.S. do Brazil s/c Ltda. - Brazil
Transamerica ICS Gmbh - West Germany
Transamerica ICS (HK) Ltd. - Hong Kong

Transamerica ICS Limited - United Kingdom
ICS Terminals (U.K.) Limited - United Kingdom
Transamerica ICS Pty. Ltd. - Australia
Transamerica Interway Container Service (Pty) Limited - South Africa
Transamerica Terminal Services Inc. - Delaware
Transamerica Rail Services Corp. - Delaware
Transamerica Trailer Services Inc. - New Jersey
Ambey Corp. - New Jersey
Transamerica Transport Inc. - New Jersey
Transamerica Transportation Services Inc. - Delaware
I/W Leasing, Inc. - Delaware
Transamerica Intermodal Maintenance Services of Florida, Inc. - Florida
Transamerica Investment Services, Inc. - Delaware
Transamerica Cash Reserve, Inc. (managed by T.I.S.) - Maryland
Transamerica Income Shares, Inc. (managed by T.I.S.) - Maryland
*Transamerica Land Capital, Inc. - California
*Bankers Mortgage Company of California - California
Transamerica Overseas Finance Corporation N.V. - Netherlands Antilles
Transamerica Realty Services, Inc. - Delaware
*The Gilwell Company - California
Pyramid Investment Corporation - Delaware
Transamerica Development Company - California
Transamerica Minerals Company - California
Transamerica Real Estate Management Company - California
Transamerica Oakmont Corporation -
*Transmerica Systems Operation

*Designates INACTIVE COMPANIES